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In the Supreme Court of the United States

October Term, 1982

JAMES NOLAN ALDRICH,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTIONS PRESENTED

WHETHER THE PETITIONER'S RIGHTS, GUARANTEED HIM BY THE *FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* WERE VIOLATED BY:

1. THE TRIAL COURT AMENDING THE "COMPLAINT/INFORMATION" UPON WHICH THE PETITIONER WENT TO TRIAL AND AFTER EVIDENCE WAS BEFORE THE JURY, BY GIVING AN ERRONEOUS INSTRUCTION CHANGING ELEMENTS OF THE OFFENSE UPON WHICH PETITIONER AND HIS COUNSEL RELIED TO PREPARE THEIR DEFENSE.

2. THE TRIAL COURT LIMITING CONFRONTATION OF WITNESSES AGAINST THE ACCUSED, USING AS A BASIS K.S.A. (KANSAS STATUTES ANNOTATED) 60-422(c), (d); and WHETHER THAT STATUTE IS UNCONSTITUTIONAL AS IT HAS BEEN INTERPRETED BY THE HIGHEST COURT OF KANSAS IN AFFIRMING THE TRIAL COURT'S CONDUCT IN THIS CASE.

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No.

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vs.

STATE OF KANSAS,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

The petitioner James Nolan Aldrich respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Kansas entered in this proceeding on February 19, 1983.

OPINION BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 458 P.2d 1027 as *State v. Aldrich*, and the same is fully set out in the appendix hereto as A1.

JURISDICTION

The judgment of the Supreme Court of Kansas was filed (entered) on February 19, 1983. On April 9, 1983 Counsel of Record filed *Application for extension of time in which to File Petition for Writ of Certiorari* in this Court. On April 12, 1983, Mr. Justice Byron White signed an order extending time for filing this petition until, and including May 20, 1983. This petition is filed within the thirty additional days granted by Mr. Justice White's order of April 12, 1983. This Court's jurisdiction is raised under Title 28, United States Code §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, reads as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger: nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The Sixth Amendment to the United States Constitution, reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution, Section 1, states as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

Kansas Statutes Annotated 60-422(c), (d).

Kansas Statutes Annotated 21-3506.

Kansas Statutes Annotated 21-4501(b).

STATEMENT OF THE CASE

This petition is brought as a result of an affirmance of petitioner's conviction of one count of a two count "Complaint/Information" brought in the District Court of Sedgwick County, Kansas, by the Supreme Court of Kansas, The highest Court of that State.

On the 7th day of December, 1981 petitioner was charged with committing two acts of sodomy with a 10-year-old stepdaughter. The charges were set out in a two count "Complaint/Information" which charged that the crimes took place "on or about the 28th day of November, 1981" and "on or about the 1st day of December, 1981" respectively, as counts "one" and "two". (Appendix A13).

On January 7, 1982 petitioner and his attorney attended a preliminary hearing. The alleged victim was the only witness presented by the state and she testified consistent with the "Complaint/Information" to two incidents being on the 28th of November, 1981 and the 1st of December, 1981. The petitioner presented no witnesses nor testimony at the preliminary hearing. Petitioner was bound over for trial which commenced before judge and jury on March 15, 1982.

During the trial of the case the alleged victim testified to the two specific instances set out in the "Complaint/Information." She testified to no other instances. On cross-examination of the victim defense counsel attempted to impeach the credibility of the witness by confronting her with a "Playgirl" magazine which had been found in her room by a defense witness and which another defense witness had seen her looking at, on at least one occasion. The trial Court denied counsel the right to cross-

examine her on this point until a "foundation was laid," pursuant to an objection by the state. During the case in chief of the defense, counsel for petitioner attempted to lay the foundation for introduction of the exhibit (intending to recall the witness and confront her with it, since she had denied ever seeing it). Counsel made it perfectly clear the exhibit was sought to be used for the sole purpose of testing the credibility of the witness. Counsel stated, "So this is offered for the purpose of showing that when Michele Goetz, the witness here, state she had never seen this magazine before, she was not telling the truth." (Tr. Tran. 152, L. 21-23). The trial Court sustained the state's objection to any mention of the exhibit, even to the defendant's own witnesses, and the Court forbad counsel to lay any foundation, citing K.S.A. 60-422(d). (The text of this statute is at Appendix A12 to this petition.) (Tr. Tran. 148, L. 9-10). Counsel made a proffer (offer of proof) and noted exception to the ruling citing petitioner's right to confront the witness under the *Sixth Amendment to the United States Constitution.* (Tr. Tran. 153, L. 9-14).

Another witness called by the state was the natural mother of the victim, Joyce Aldrich, wife of the petitioner. Defense counsel had proof that she was a dishonest person and a liar. He was prepared to prove that she signed false affidavits to draw welfare while receiving money from her husband and working, making a good salary and tips. Counsel was completely forbidden to question the witness on this, or any other specific instance of dishonest behavior of the witness, again citing K.S.A. 60-422(d). (Appendix A12). The Court stated, "In the meantime, we have researched the question concerning evidence of specific conduct to impeach a witness, and under the statute, I'm satisfied that 60-422(d) controls and states that evidence of specific instances of conduct cannot be used to

impeach." (Tr. Tran. 93, L. 5-9). The Court went on to say that ". . . this limitation is one of expediency and very generally recognized." (Tr. Tran. 94, L. 24-5). When counsel for petitioner attempted to note formal objection he was cut off by the Court (Tr. Tran. 95, L. 9-11) calling the jury back, and talking to the witness counsel was seeking to impeach.

During the course of the trial, the cross-examination of the state's witnesses revealed that petitioner's counsel was prepared to defeat the dates upon which the state had charged the petitioner with having committed the acts complained of. Indeed counsel had based his entire defense on the fact that he could prove that the victim was never with the petitioner on the 28th day of November, 1981, and that on the 1st of December, 1981, at the time the victim said her stepfather molested her, there were other independent persons in the house, and no such act occurred.

The state requested the Court to give an instruction which stated that "time was not an element of the offense" charged. The requested instruction is reproduced at Appendix A15 of this petition. The state's requested instruction still contained the phrase that the crime occurred "on or about the 1st day of December. . ." The trial Court, instead, gave an instruction of its own invention with absolutely no precedent. (While the whole of the instructions of the Court are set out in Appendix A16 of this petition, the offensive portion is Subparagraph 4 of Instruction 3.) Counsel for petitioner made a very long and strong objection to the instruction. He cited the "due process clause" of the *Fifth Amendment to the United States Constitution,* the "Due process and equal protection clauses" of the *Fourteenth Amendment to the United States Constitution.* Counsel pointed out to the

Court that the instruction produced a great variance between the pleadings and instruction and was deceptive and misleading, violating "due process requirements." Counsel moved the Court that the "Complaint/Information" be dismissed and the state file a complaint stating "on diverse time and occasions from—and until—" if they intended to rely on a continuing course of conduct. Counsel even sought to leave to seek a Writ of Prohibition from the Supreme Court of Kansas to prevent the erroneous instruction. Counsel predicted that the jury would be confused by the instruction. (They were). (Tr. Tran. pp. 316-336). The Court overruled all of counsel's objections and arguments and gave the instruction set out at Appendix A16(18).

After some deliberation the jury sent down a note asking the judge to repeat part of Joyce Aldrich's testimony and seeking guidance on the offensive instruction. Their question was,

> "Instructions number two and three, item four: This act . . . within two years before December 7th 1981.—Definition of this statement—for example: If the jury should feel that the act as charged occurred, but not on dates charged (28 December [sic] and 1 December) but on say 1 November and 6 December, does this meet the test of item four."

In answer to the jury's question, and over another objection by defense counsel and a motion for mistrial verbally made, the Court told the jury,

> "And the answer to that question is yes. The act under either count must have occurred at a time within the statute of limitations which is two years before Dec. 7th, 1981." (Tr. Tran. 367, L. 5-8).

The jury convicted the petitioner on count two of the complaint.

Defendant filed timely Motion for New Trial, and "Motion for Acquittal Non Obstante Veredicto," both citing the *Fifth, Sixth and Fourteenth Amendment* assignments of error noted above and expanding thereon. Both motions were by the Court overruled and defendant was sentenced to "ten years to life" in the State Penitentiary. The judgment order filed in the cause is reproduced at Appendix A8 of this petition. Appeal bond was set at Fifty Thousand Dollars, which petitioner could not make and he has been in prison since April 23, 1982.

Counsel appealed the cause to the Supreme Court of Kansas and page 4 of petitioner's brief to that Court, *Appellant's Issues on Appeal,* is reproduced in Appendix A23-24 of this petition.

The Supreme Court of Kansas heard argument in the case and affirmed the conviction. The entire text of that opinion is reproduced at Appendix A1 of this petition. Stated in its simplest terms, the highest Court of Kansas ruled that K.S.A. 60-422(c), (d) properly limits cross-examination of witnesses (the opinion makes absolutely no mention whatever of petitioner's *U.S. Constitutional* assertions). On the issue of the erroneous instruction the Supreme Court of Kansas agreed with petitioner that the instruction was error. The Supreme Court agreed with counsel for petitioner that the trial Court should have given P.I.K. Crim. 2d 57.58 (the instruction argued for at the trial by counsel for petitioner) but the Kansas Supreme Court found that the trial Court's error was "not prejudicial." The Pattern Instruction the Court says should have been given is reproduced at Appendix A21-22 of this petition. It is from this adverse ruling of the highest Court of the State of Kansas that this petition for a Writ of Certiorari to that Court is sought. This petition is filed within the 30 day period of extension granted by Mr. Justice Byron White on April 12, 1983.

REASONS FOR GRANTING THE WRIT

1. PETITIONER'S RIGHTS TO DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE TRIAL COURT "AMENDING" THE "COMPLAINT/INFORMATION" UPON WHICH THE PETITIONER WENT TO TRIAL VIA THE GIVING OF AN ERRONEOUS INSTRUCTION WHICH ENLARGED THE INFORMATION AND ALLOWED THE JURY TO CONVICT THE PETITIONER OF A CRIME OTHER THAN THAT SPECIFIED IN THE INFORMATION.

The "Complaint/Information" filed in the case specified two distinct dates upon which the petitioner allegedly committed the acts of oral sodomy with the victim. Counts one and two were respectively given as having occurred on or about the 28th day of November, 1981 and the 1st day of December, 1981. At the preliminary hearing the victim testified to those specific dates. Trial by jury commenced on 15 March 1982 and during the course of the trial the state requested the instruction given at Appendix A15 of this petition. The trial judge "invented" his own instruction completely removing any mention of the dates the jury had heard when the information was read to them at the commencement of trial. This offending instruction was given over the strong objection of defense counsel who even sought leave to obtain a two day recess to file a Writ of Prohibition in the Supreme Court of Kansas. Counsel raised the *Fifth, Sixth and Fourteenth Amendments to the United States Constitution* prior to the giving of the instruction by the Court. The jury was confused by the instruction and sent a note to the Court asking, essentially, if they could convict the peti-

tioner if they believed he committed the offense on December 6, 1981, an impossibility, since there had been testimony that the victim went to the police on December 3, 1981, and was never thereafter in the presence of the petitioner except in Court. The Court, again over objection of defense counsel, told the jury they could so convict. They did. The Supreme Court of Kansas *agreed that the wrong instruction was given* and that the judge should have given the "Pattern Instruction" P.I.K. 57.08, sanctioned to be given in Kansas, which would have agreed with the information and told the jury that the offense occurred "on or about the 1st day of December, 1981." They went on to hold the error "not prejudicial." The defendant is in prison. This opinion of the Kansas Supreme Court is inconsistent with prior opinions of this United States Supreme Court and other Federal Courts on this subject. (A copy of the "Pattern Instruction" referred to in the Kansas opinion can be found in Appendix A21-22 of this petition, and the offending instruction is set out as "inst. 3(4)" in Appendix A16-21 of this petition.)

There is a general rule that allegations and proof must correspond so that,

> "(1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *Berger v. United States,* 295 U.S. 78, 79 L.Ed. 1314, 1318(4) (1935).
>
> "to uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process."

Dunn v. U.S., 442 U.S. 100, 60 L.Ed.2d 743, 99 S.Ct. 2190 (1979) also *Garner v. Louisiana,* 368 U.S. 157, 7 L.Ed.2d 207, 82 S.Ct. 248 (1961), specifically, 7 L.Ed.2d 207(3).

As far back as 1875 this Court held in *United States v. Cruikshank,* 92 U.S. 542, 557-558, that "A crime is made up of acts and intent: and these must be set forth in the indictment, with reasonable particularity of *time,* place and circumstances." (Emphasis supplied). Petitioner submits that "sometime within a two year period prior to Dec. 7, 1981." is not "reasonable particularity of time, . . ."

The opinion sought to be reviewed does not even comport favorably with prior decisions of the Kansas Supreme Court on the same subject, which states in essence that instructions are to be confined to the issues in the case *as determined by the charge in the information* and the evidence adduced at trial. *State v. Seely,* 510 P.2d 115, 212 Kan. 195, 73 A.L.R.3d 183 (1973); *State v. Kincade,* 485 P.2d 1385, 207 Kan. 442 (1971); *State v. Lott,* 485 P.2d 1314, 207 Kan. 602 (1971), and others too numerous to mention found at 18 P.D. (367 P.2d) 544-545. (Pacific Digest). Thereby, the petitioner was denied "equal protection" under the *Fourteenth Amendment to the United States Constitution.* Additionally, the Kansas Supreme Court opinion sought to be reviewed makes clear that in future prosecutions the "Pattern Instruction" shall be followed. We can presume from the opinion that all future cases of this sort shall have the benefit of an instruction which matches the "Complaint/Information" or indictment, so that this petitioner will be the only prisoner in Kansas sentenced on a conviction arising out of an instruction which does not match the indictment or information filed in the case. This again violates "equal protection of the law" as set out by the *Fourteenth Amendment to the United States Constitution.*

The only testimony of any sort which the jury could have relied on to convict the petitioner was some hearsay, presented by the state, over petitioner's objection, that

the acts complained of had occurred more times than the two complained of in the "Complaint/Information." This hearsay originated in an interview between one McDavitt, of the Sedgwick County Sheriff's office and the victim on the 3rd of December, 1981, at the Sheriff's office. Neither the petitioner nor his attorney were present. Hearsay is not favored and is a very questionable way to convict a person of an "infamous crime." *Bruton v. United States,* 391 U.S. 123, 20 L.Ed.2d 476 (1968).

This Supreme Court of the United States has provided the proper method for drawing an information or indictment when the exact dates of the offense are unknown to the state. The charge should properly read "at divers times" in the complaint.

> "By use of the words 'at divers times' on the day named it notifies him that he may be called upon to meet more than one offence committed in one of the ways named." *Hodgson v. Vermont,* 168 U.S. 262, 271, 24 L.Ed. 461, 18 S.Ct. 80 (1897).

Had the "Complaint/Information" filed in this case used the "divers times" language of the *Hodgson (supra)* case, counsel for petitioner would have sought a Bill of Particulars or at least have been on fair warning of the nature of the testimony and proof the state would rely on to make its charge. His defense would have proceeded quite differently. In the case at bar, the "Complaint/Information" becomes insufficient, or at best deceptive and misleading, *when read in pari materia* with the erroneous instruction given in the charge to the jury. It denies petitioner a "fair trial" and violated his rights to "due process of law, equal protection," and "effective assistance of counsel" under the *Fifth, Sixth and Fourteenth Amendments to the United States Constitution.* It is hard to imagine how the erroneous instruction was "not prejudicial" when the

whole defense was obviously built around the fact that the times alleged in the "Complaint/Information" were quite specific. Nor is it a consolation to one in prison for ten years to life that the Supreme Court of Kansas has held that "the exact time of the commission of the offense is not an indispensable element of the offense charged. The exact time of the offense need not be pleaded in the information." *State v. Aldrich,* 658 P.2d 1027 (1983), citing *State v. Sisson,* 217 Kan. 475, 536 P.2d 1369 (1975) (a case in which the time element "on or about" a specific date *was given* in the instruction.) The point is, in the case at bar the exact time of the offense WAS pleaded in the information! Further, its particularity was relied upon by petitioner in preparing his defense. (Tr. Tran. 328, L. 11-21).

This Supreme Court of the United States has held, in a sex-crime case, which is "one of the most detestable and abominable that can be committed, yet a charge of that nature is also one which all judges have recognized as easy to be made and hard to be defended against" that "No portion of the charge of the court, under such circumstances, can be said to be harmless if it did not state correctly and fully the law applicable to the crime, ..." *Mills v. United States,* 164 U.S. 644, 646, 41 L.Ed. 584 (1897).

It is "hornbook law" that a "Complaint/Information" serves the same purpose in many state prosecutions as an indictment and presentment in the Federal system of justice. Obviously the same rules should apply with reference to its use.

The opinion of the Supreme Court of Kansas sought to be reviewed is also contrary to opinions of several United States Courts of Appeal which hold, in essence, that a charge in an indictment cannot be broadened, whether by change in wording of the indictment, a Bill of Particulars,

or an instruction to a jury. United States v. Spector, 326 F.2d 345 (2) (7th Cir. 1963); *United States v. Stewart Clinical Laboratory,* 652 F.2d 804 (4) (9th Cir. 1981); *United States v. Muselli,* 534 F.2d 1197 (C.A. Ohio 1976); *Stewart v. United States,* 395 F.2d 484 (1968).

Also in point is a decision of the Circuit Court of Appeals of Alaska, wherein a supplemental instruction was given to the effect that if there was language in the indictment, which was not in the original instruction, it should be regarded as surplusage. The Court of Appeals ruled that this was an impermissible amendment of the indictment because it permitted the jury to convict on the basis of evidence introduced at trial regarding women other than the two named in the indictment. *Howard v. Dagget,* 526 F.2d 1388 (C.A. Alaska 1976).

That an erroneous instruction can be the basis for reversal is the case in *Cool v. United States,* 409 U.S. 100, 34 L.Ed.2d 335, 93 S.Ct. 354 (1972).

2. PETITIONER WAS DENIED HIS RIGHT TO ASSISTANCE OF COUNSEL AND CONFRONTATION OF THE WITNESSES AGAINST HIM GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

K.S.A. (Kansas Statutes Annotated) 60-422(c), (d) (Appendix A12) served as the trial Court's basis for denying petitioner the right to fully confront cross-examine), two key state witnesses against him. They were the prosecutrix herself and her natural mother, Joyce Aldrich, wife of the petitioner (estranged). In each instance counsel for petitioner sought to impeach the witness by showing that they were prone to be dishonest and not truthful. In the case of the alleged victim Michele

Goetz, petitioner had two witnesses who would dispute her averment on the witness stand that she had never seen the proferred exhibit. In the case of Joyce Aldrich, counsel had pay stubs from her place of employment, as well as her husband, the petitioner, and her former employer to testify that she was working and receiving money from her husband, at the same time counsel was prepared to show that she signed false affidavits in order to receive welfare and aid to dependent children. This act of signing false affidavits was offered by counsel only for the limited purpose of showing that the witness was not credible and had skant regard for the truth. Since there was *only* the testimony of the victim herself, and absolutely no physical evidence, of the crimes alleged, it was especially important to the defense to impeach her credibility, insofar as that might be possible. As to the count of the "Complaint/Information" on which petitioner was convicted (count two), originally denominated December 1st, it was the testimony of Joyce Aldrich which tended to refute two independent defense witnesses, and it was Joyce Aldrich's testimony (a portion thereof) which the jury asked to be repeated. The portion they requested concerned the date of December 1, 1981, and times on that date. (The victim had alleged the crime took place at approx. 8 P.M.)

The trial Court forbad counsel to pursue any question of a specific act of dishonesty or untruthfulness, and the Supreme Court of Kansas in *State v. Aldrich,* 658 P.2d 1027, the cause here sought to have reviewed, ruled that the statute indeed forbids a defendant from cross-examining a state witness as to specific acts of dishonesty. This ruling by the highest Court of the State of Kansas interprets a statute of the State of Kansas, to wit K.S.A. 60-422(c), (d), in a manner inconsistent with prior rul-

lings of this United States Supreme Court and other Federal Courts, and the net effect of such interpretation of the statute makes it unconstitutional as violative of petitioner's right to confrontation of a witness against him under the *Sixth and Fourteenth Amendments to the United States Constitution.* Further, the denial of petitioner's right to a searching cross-examination of a key witness in the state's case denied petitioner effective assistance of counsel, and due process of law under the *Fifth and Fourteenth Amendments to the United States Constitution.* In another case, *State v. Humphrey,* 217 Kan. 352, 537 P.2d 155, 164 (1975) (16-18) the Kansas Supreme Court said "It has been stated that the reason for the restriction is that where character is only incidentally involved *it would not be expedient* to let the trial go off on collateral tangents which would result from trying out the factual issues involved in the proof of specific instances of conduct." (Emphasis supplied). Apparently the Constitutional rights guaranteed under the *Sixth and Fourteenth Amendments of the United States Constitution* must bow to "expediency" in Kansas. This *Humphrey* case (*supra*) came only one year after this United States Supreme Court stated in *Davis v. Alaska,* 415 U.S. 308, 39 L.Ed.2d 347, 353-354 (1974) that,

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a

> prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony."

This Court has held that cross-examination secured by confrontation clause of the *Sixth Amendment* is applicable to states by the *Fourteenth Amendment, Roberts v. Russell,* 392 U.S. 293, 20 L.Ed.2d 1100 (1968). It has further ruled that "testing Credibility" is a proper function of cross-examination, *District of Columbia v. Clawans,* 300 U.S. 617 (1936), citing *Alford v. U.S.,* 282 U.S. 687. It held that "But prevention throughout the trial of a criminal case . . . particularly in circumstances where the excluded questions have a bearing on credibility . . . passes the proper limits of discretion and is prejudicial error."

In *Crawford v. U.S.,* 212 U.S. 183, 53 L.Ed. 465 (1908) this Court cited *Deery v. Cray,* 5 Wallace 795, 807, and *Smith v. Shoemaker,* 17 Wallace 630, to the effect that,

> "There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking the review is not cause for the reversal of the judgement."

And more recently the Court has held that,

> "Although an accused's right to confront and cross-examine witnesses is not absolute and may, in appropriate cases bow to accommodate other legitimate interests in the criminal trial process, nevertheless its

> denial or significant diminution calls into question the integrity of the fact finding process and requires that the competing interest be closely examined." *Chambers v. Mississippi,* 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973).

The case also held that where a defendant was thwarted in attempting to present portions of his defense by a strict application of state rules of evidence, that application rendered the trial "fundamentally unfair." *Chambers (supra).* And, in the case of *Brookhart v. Janis,* 384 U.S. 1, 3, 16 L.Ed.2d 314, 316, 86 S.Ct. 1245 (1966) this Court held that "a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing want of prejudice would cure it."

In view of the above, petitioner urges to this Court that his right to confrontation of witnesses was violated by the application of K.S.A. 60-422(c), (d), and that that statute, as it has been interpreted in this case by the highest Court of the State of Kansas is unconstitutional, in violation of rights secured to defendants under the *Sixth and Fourteenth Amendments to the United States Constitution.* That its application by the trial Court in this cause rendered his trial "fundamentally unfair" and thereby violated his rights to due process under the *Fifth and Fourteenth Amendments to the United States Constitution,* not to mention his right to effective assistance of counsel under the *Sixth Amendment.*

CONCLUSION

WHEREFORE: in view of the above and foregoing, petitioner verily believes that the rights guaranteed him by the *Fifth, Sixth and Fourteenth Amendments to the United States Constitution,* have been violated by the trial Court and such violation persists in the ruling of the Supreme Court of Kansas, which is inconsistent with prior rulings of this United States Supreme Court, and with other Federal Courts of Appeal, pursuant to Rule 17 of this Court and Title 28, United States Code §1257(3), now, therefore petitioner prays that this Honorable Court issue a Writ of Certiorari to the Supreme Court of Kansas to review its decision in *State v. Aldrich,* 658 P.2d 1027 (1983).

Respectfully submitted,

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(Counsel of Record)
P. O. Box 16035,
Kansas City, Missouri 64112

GEORGE R. DOCKING
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Attorneys for Petitioner

May 19, 1983

APPENDIX

STATE of Kansas, Appellee,

v.

James Nolan ALDRICH, Appellant.

No. 54479.

Supreme Court of Kansas.

Feb. 19, 1983.

Defendant was convicted in the Sedgwick District Court, Hal Malone, J., of aggravated sodomy, and he appealed. The Supreme Court, Miller, J., held that: (1) trial court did not err in refusing to permit defendant to cross-examine prosecution witness about specific instance of witness' conduct relevant only to prove character trait; (2) trial court did not err in excluding irrelevant evidence; (3) hearsay testimony of police detective was admissible; and (4) although trial court erred in instructing jury, error was not prejudicial.

1. Witnesses (Key) 344(1)

Although witness' credibility may be attacked by showing that witness' character traits for honesty and veracity are bad, such traits may be shown only by opinion testimony or evidence of reputation and not by specific instances of witness' conduct. Rules of Evid., K.S.A. 60-422(c, d).

2. Witnesses (Key) 344(1)

In prosecution for aggravated sodomy, trial court did not err in refusing to permit defendant to cross-examine prosecution witness about specific instance of witness' conduct relevant only to prove her character trait. K.S.A. 21-3506; Rules of Evid., K.S.A. 60-422(c, d).

3. Witnesses (Key) 352

In prosecution for aggravated sodomy, publication featuring full frontal views of nude males, which defendant claimed was found in victim's room, was not admissible to impeach witness since whether victim had ever seen magazine would not remotely reflect on her truth or veracity. K.S.A. 21-3506; Rules of Evid., K.S.A. 60-422 (c, d).

4. Sodomy (Key) 3

Consent or morality of victim are not defenses to charge of aggravated sodomy when victim is but ten years old. K.S.A. 21-3506.

5. Criminal Law (Key) 419(4)

In prosecution for aggravated sodomy, testimony of police detective as to what victim had told him was admissible hearsay, since statement made by victim to detective tended to show continuing course of conduct between victim and defendant, and would have been admissible if testified to by victim upon direct examination. K.S.A. 21-3196; Rules of Evid., K.S.A. 60-460(a).

6. Sodomy (Key) 5

Exact time of commission of aggravated sodomy with ten-year-old child was not indispensable element of offense and did not have to be pleaded in information. K.S.A. 21-3506.

7. Criminal Law (Key) 772(4), 1173.2(2)

Where it was charged that defendant committed aggravated sodomy with ten-year-old child on or about certain date, jury should have been told in elements instruction that it must be proved that act occurred on or about

date set forth in information; however, error in failing to give such instruction did not prejudice defendant and did not require reversal since jury was not misled. K.S.A. 21-3106.

Syllabus by the Court

1. The exact time of the commission of aggravated sodomy with a ten-year-old child is not an indispensable element of the offense.

2. Where it is charged that the defendant committed aggravated sodomy with a ten-year-old child on or about a certain date, the jury should be told in the elements instruction that it must be proved that the act occurred on or about the date set forth in the Information. PIK Crim.2d 57.08 is an appropriate elements instruction; it should be followed.

3. In an appeal from a conviction of aggravated sodomy with a ten-year-old girl, the record is examined and it is held that the trial court did not err in refusing to permit the defendant to cross-examine a prosecution witness about a specific instance of the witness's conduct, relevant only to prove a character trait; in excluding irrelevant evidence; or in receiving admissible hearsay; and that although the trial court erred in instructing the jury, the error was not prejudicial.

George R. Docking, Kansas City, and David C. McConnell, Kansas City, Mo., argued the cause and were on brief, for appellant.

Geary N. Gorup, Asst. Dist. Atty., argued the cause, and Robert T. Stephan, Atty. Gen., and Clark V. Owens, Dist. Atty., were with him on brief, for appellee.

MILLER, Justice:

The defendant, James N. Aldrich, was convicted by a jury of causing his ten-year-old stepdaughter to perform acts of oral sodomy upon him in violation of K.S.A. 21-3506. He appeals, asserting error by the trial court in limiting cross-examination, in rejecting a proposed defense exhibit, in admitting certain hearsay testimony, and in instructing the jury.

[1, 2] At trial, defendant's estranged wife, Joyce Aldrich, was called as a witness for the prosecution. Defense counsel proposed to impeach her by inquiring upon cross-examination whether she had once sworn to a false affidavit in order to receive welfare benefits for her children. The court refused to allow such evidence and defendant now claims this was error. K.S.A. 60-422(d) provides in substance that evidence of specific instances of a witness's conduct, relevant only as tending to prove a trait of his or her character, shall be inadmissible. Thus, although a witness's credibility may be attacked by showing that the witness's character traits for honesty and veracity are bad, K.S.A. 60-422(c), such traits may be shown only by opinion testimony or evidence of reputation and not by specific instances of the witness's conduct. *State v. Smallwood,* 223 Kan. 320, 326-27, 574 P.2d 1361 (1978). The trial court properly limited the cross-examination.

[3, 4] Defendant's proposed exhibit No. 1 was a copy of Playgirl magazine, a publication featuring full frontal views of nude males, which defendant claimed was found in the victim's room. He contends that this magazine should have been admitted to impeach the witness. We find no merit in this assertion. Whether the victim had ever seen the magazine would not remotely reflect on her truth or veracity. K.S.A. 60-422(c). Consent or the morality of the victim are not defenses to a

charge of aggravated sodomy when the victim is but ten years old. The proffered exhibit was not relevant and was properly excluded.

[5] Detective McDavitt, of the Wichita police department, was permitted to testify, over objection, as to what the victim had told him. The defendant argues that this testimony was inadmissible hearsay. The victim was present at trial and was fully cross-examined by the defendant. The statement made by the victim to the detective tended to show a continuing course of conduct between the victim and the defendant, and would have been admissible if testified to by the victim upon direct examination in this case. *State v. Crossman,* 229 Kan. 384, 387, 624 P.2d 461 (1981). The testimony of Detective McDavitt was admissible hearsay under K.S.A. 60-460(a), and was properly received in evidence. *State v. Taylor,* 217 Kan. 706, Syl. ¶ 7, 538 P.2d 1375 (1975).

Defendant's primary argument on appeal is that the trial court committed prejudicial error in the jury instructions. Before discussing this point, we should present additional background facts.

Count I of the Information filed in this case charges the defendant with committing aggravated sodomy with his ten-year-old stepdaughter on or about November 28, 1981. Count II charges him with the commission of the same offense with the same child on or about December 1, 1981. The Information was read to the jury by the trial judge, and the two dates were given to the jury during the prosecution's opening statement. All of the State's evidence was targeted on November 28 and either December 1 or December 2. The defendant presented evidence that the victim was not in the home with him on November 28, and that other people were present

in the home part of the time on December 1. The jury acquitted the defendant of aggravated sodomy as charged in Count I and convicted him of committing the offense as charged in Count II.

The trial court, in defining the elements of each crime charged, instructed the jury that it must be proved "That this act occurred in Sedgwick County, Kansas, *within 2 years before December 7, 1981.*" (Emphasis supplied.) December 7 was the date on which the complaint was filed and the prosecution commenced; the two-year period represents that included within the statute of limitations fixed by K.S.A. 21-3106. Defendant contends that the instruction was prejudicial to him because the specific dates were set forth in the Information and defendant presented evidence which would refute the claim that the acts occurred on the dates specified. We note that there was no bill of particulars; the Information, drawn in the usual language, charged only that the acts occurred "on or about" the dates specified.

In *State v. Sisson*, 217 Kan. 475, 536 P.2d 1369 (1975), a case in which the defendant was convicted of taking indecent liberties with his thirteen-year-old stepdaughter by having sexual intercourse with her, the trial court instructed the jury that the phrase "on or about the 13th day of March, 1972" under Count II of the Information in that case means "that the alleged criminal act . . . must have occurred at a time within the statute of limitations" and that the statute of limitations was two years from the date the Information was filed. The appellant's argument in *Sisson* was much the same as the argument here. In *Sisson*, this court rejected the defendant's arguments, and found that defendant was not prejudiced by the instruction because the exact time was not crucial to proving the offense.

[6] As in *Sisson,* we are convinced here that the exact time of the commission of the offense is not an indispensable element of the offense charged. The exact time of the offense need not be pleaded in the Information. The trial court's instruction therefore properly states the law. See *The State v. Kennedy,* 105 Kan. 347, 353, 184 P. 734 (1919); and *State v. Bisagno,* 121 Kan. 186, Syl. ¶ 2,246 P. 1001 (1926). There was no specific evidence that the offense was committed other than on or about the dates specified in the Information, and defendant's argument that he could have been convicted of an act not charged is not persuasive. No other act was specifically described in the evidence.

[7] We do think, however, that the trial court erred; it should have given the elements instruction suggested in PIK Criminal. See PIK Crim.2d 57.08. The trial court should have specified in the instructions that the offense occurred "on or about the 1st day of December, 1980," as charged in the Information. In light of the evidence that the offense could have occurred on December 2, the trial court could have instructed the jury that the State was not bound to establish that the offense occurred on December 1, but it would meet its burden by establishing that the act occurred "on or about" that date. Since there was no evidence that the offense occurred *after* the filing of criminal charges against the defendant, and no evidence that the offense occurred anywhere near the excluded period *before* the charges were commenced, a specific instruction on the period covered by the statute of limitations was unnecessary.

We do not believe, however, that the court's error in instructing the jury prejudiced the defendant. During its deliberations, the jury inquired whether it would be sufficient to convict if the jury found that the criminal

acts were committed not on the dates charged but on November 1 and December 6. The trial court responded that it would. This question, and the court's response, indicates that the jury was not misled by the instructions and the defendant suffered no prejudice.

The judgment is affirmed.

(Filed May 3, 1982)

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 81CR1945

Division No. C

THE STATE OF KANSAS,
Plaintiff,

vs.

JAMES N. ALDRICH,
Defendant.

JOURNAL ENTRY OF JUDGMENT

On this 15th day of March, 1982, this case comes on for trial, the defendant having been bound over for arraignment by the Honorable Robert C. Helsel, Judge of Position No. G of the Eighteenth Judicial District Court on the Information charging him with Aggravated Sodomy, Counts One and Two, contrary to K.S.A. 21-3506. The State of Kansas appears by its attorney, Janice E. Fitch, Assistant District Attorney. The defendant appears in person and by his attorney, David C. McConnell and Charles Green.

Thereupon, a Jury is duly impaneled and sworn and evidence is presented from court day to court day until both sides rest.

The following witnesses were sworn and testified:

Michele Goetz, Sedgwick County, Kansas;

Joyce Aldrich, Sedgwick County, Kansas;

Jim McDavitt, Sedgwick County, Kansas;

George Newkirk, Sedgwick County, Kansas;

Jacqueline Newkirk, Sedgwick County, Kansas;

Linda Eckhardt, Sedgwick County, Kansas;

Heide Huenergardt, Sedgwick County, Kansas;

Dottie Roggenkamp, Sedgwick County, Kansas;

Gretchen Huenergardt, Sedgwick County, Kansas;

Jane Huenergardt, Sedgwick, County, Kansas;

George Huenergardt, Sedgwick, County, Kansas;

James Aldrich, Sedgwick County, Kansas;

Krissy Hart, Sedgwick County, Kansas;

Anthony Wayne Hart, Sedgwick County, Kansas.

Thereafter, on the 18th day of March, 1982, the Jury, after having received the evidence, the instructions of the Court, the arguments of counsel and having duly deliberated, returned the following verdict in open court:

"We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant not guilty of Count 1.

Date of this verdict, March 18, 1982. /s/ David H. Lowell
Foreman".

"We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant guilty of Count 2.

Date of this verdict, March 18, 1982. /s/ David H. Lowell Foreman".

Thereupon, the Court accepted the verdict, excused the Jury, and continues this case for sentencing and/or motion for new trial.

Thereafter, on the 23rd day of April, 1982, all parties appear as aforesaid.

Defendant's motion for new trial is heard by the Court, who, after examining the file, hearing the statements of counsel and being fully advised in the premises, overrules said motion.

The Court inquires of the defendant if he has any legal cause to show why judgment of sentence should not be pronounced against him; the defendant failing to show any such cause and none appearing, there being none, the Court then proceeds to pronounce judgment of sentence against the defendant being advised of the presentence report prepared by the Court's Probation Officer.

IT IS THE SENTENCE OF THIS COURT AND IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant is hereby committed to the custody of the Secretary of Corrections for imprisonment for a period of not less than ten (10) years to Life imprisonment on the charge of Aggravated Sodomy, contrary to K.S.A. 22-3506 and in accordance with K.S.A. 21-4501(b). Defendant shall pay the costs of this action to the Clerk of this Court, including witness fees and miscellaneous expenses.

IT IS FURTHER ORDERED that the Clerk of this Court deliver two (2) certified copies of this judgment

and commitment to the Sheriff of Sedgwick County, Kansas, or one of his duly authorized deputies. It is further ordered that such certified copies serve as the commitment of the defendant and said Sheriff or authorized deputy transport the defendant to the custody of the Secretary of Corrections for imprisonment and make due return thereof.

IT IS FURTHER ORDERED that the defendant be taken to the Kansas State Reception and Diagnostic Center at Topeka, Kansas, for examination, evaluation and report to this Court, in writing, within 100 days from the date of this Journal Entry.

IT IS FURTHER ORDERED that for the purpose of computing defendant's sentence, his parole eligibility and conditional release dates thereunder, that such sentence shall be computed from: April 23, 1982.

The Court further informs the defendant of his right to appeal this decision to the Appellate Courts of the State of Kansas and sets Appeal Bond in the amount of $50,000.00.

IT IS SO ORDERED.

/s/ Hal Malone
Hal Malone, Judge
Sedgwick County, Kansas

APPROVED BY:

/s/ Janice E. Fitch
Janice E. Fitch
Assistant District Attorney

David C. McConnell
Attorney for Defendant

Charles Green
Attorney for Defendant

K.S.A. 60-422

60-422. Further limitation on admissibility of evidence affecting credibility. As affecting the credibility of a witness *(a)* in examining the witness as to a statement made by him or her in writing inconsistent with any part of his or her testimony it shall not be necessary to show or read to the witness any part of the writing provided that if the judge deems it feasible the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness; *(b)* extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him or her an opportunity to identify, explain or deny the statement; *(c)* evidence of traits of his or her character other than honesty or veracity or their opposites, shall be inadmissible; *(d)* evidence of specific instances of his or her conduct relevant only as tending to prove a trait of his or her character, shall be inadmissible. [L. 1963, ch. 303, 60-422; Jan. 1, 1964.]

K.S.A. 21-3506

21-3506. Aggravated sodomy. Aggravated sodomy is sodomy committed:

(a) With force or threat of force, or where bodily harm is inflicted on the victim during the commission of the crime; or

(b) With a child under the age of sixteen (16) years.

Aggravated sodomy is a class B felony.

History: L. 1969, ch. 180, § 21-3506; July 1, 1970.

K.S.A. 21-4501

21-4501. Classification of felonies and terms of imprisonment. For the purpose of sentencing, the following classes of felonies and terms of imprisonment authorized for each class are established:

* * *

(b) Class B, the sentence for which shall be an indeterminate term of imprisonment, the minimum of which shall be fixed by the court at not less than five years nor more than 15 years and the maximum of which shall be fixed by the court at not less than 20 years nor more than life.

(Filed December 7, 1981)

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 81CR1945

THE STATE OF KANSAS,
Plaintiff,

vs.

JAMES N. ALDRICH,
Defendant.

COMPLAINT/INFORMATION

COUNT ONE

COMES NOW MICHAEL BARBARA, a duly appointed, qualified and acting Assistant District Attorney of the 18th Judicial District of the State of Kansas, and for and on behalf of said State gives the court to under-

stand and be informed that in the County of Sedgwick, and State of Kansas, and on or about the 28th day of November A.D., 1981, one JAMES N. ALDRICH did then and there unlawfully, willfully, engage in oral copulation with Michele M. Goetz, a child under the age of sixteen (16) years, to-wit: ten (10) years, who was not the spouse of the said JAMES N. ALDRICH;

COUNT TWO

And on or about the 1st day of December, 1981, one JAMES N. ALDRICH did then and there unlawfully, willfully, engage in oral copulation with Michele M. Goetz, a child under the age of sixteen (16) years, to-wit: ten (10) years, who was not the spouse of the said JAMES N. ALDRICH; K.S.A. 21-3506 (Aggravated Sodomy, Count One and Two, Class B Felony)

all of the said acts then and there committed being intentional, unlawful, and willfully and being contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Kansas.

/s/ Michael Barbara
Assistant District Attorney
Michael Barbara

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 81-CR-1945

Pos. No. C

STATE OF KANSAS,
Plaintiff

-vs-

JAMES N. ALDRICH,
Defendant

STATE'S REQUESTED INSTRUCTION

The defendant is charged with the crime of aggravated sodomy. The defendant pleads not guilty.

To establish this charge each of the following claims must be proved:

1. That the defendant had oral sexual relations with Michele M. Goetz, who was not his wife or a consenting adult of the opposite sex;
2. That there was actual penetration;
3. That the victim was a child under the age of 16 years;
4. That this act occurred on or about the 1st day of December, 1981, in Sedgwick County, Kansas. Any penetration, however slight, is sufficient.

Time is not an indispensible ingredient of the offense. The law provides it is sufficient if it be shown that the time of the offense was within the last two years (statute of limitations).

P.I.K. 57.08
State v. Kilpatrick, 2 Kan. App.2d 34 (1978), 578 P.2d 1147

IN THE EIGHTEENTH JUDICIAL DISTRICT,
SEDGWICK COUNTY, KANSAS
POSITION C

Case No. 81CR1945

STATE OF KANSAS,
Plaintiff,

vs.

JAMES N. ALDRICH,
Defendant.

INSTRUCTIONS BY JUDGE HAL MALONE

APPEARANCES:

ATTORNEY FOR PLAINTIFF: Janice Fitch

ATTORNEY FOR DEFENDANT: David C. McConnell & Charles S. Green

No. 1

Members of the jury, it is now my duty to instruct you in the law that applies to this case, and it is your duty to follow all of the instructions. You must not single out one or more instructions and disregard others. You should construe each instruction in the light of, and in harmony with, the other instructions, and you should apply the instructions as a whole to the evidence. You should decide the case by applying the law to the facts as you find them. The order in which the instructions are given is no indication of their relative importance.

Insofar as the jury is concerned, you may consider as evidence whatever is admitted in the trial as part of the record, whether it be by testimony of witnesses, or an article, or a document marked as an exhibit, or other

matter admitted; such as an admission, agreement or stipulation. Evidence you may consider can be direct or circumstantial. However, you must not resort to speculation or conjecture.

At times during the trial I have ruled upon the admissibility of evidence. Questions relating to the admissibility of evidence are solely questions of law for the Court and you must not concern yourselves with these rulings. I have not meant to indicate any opinion as to the facts or as to what your verdict should be, by any ruling that I have made or anything that I have said or done.

No. 2

The defendant is charged in count 1 with the crime of aggravated sodomy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant had oral sexual relations with Michelle M. Goetz, who was not his wife or a consenting adult of the opposite sex;

2. That there was actual penetration;

3. That the victim was a child under the age of 16 years; and

4. That this act occurred in Sedgwick County, Kansas, within 2 years before December 7, 1981.

No. 3

The defendant is charged in count 2 with the crime of aggravated sodomy. The defendant pleads not guilty.

To establish this charge, each of the following claims must be proved:

1. That the defendant had oral sexual relations with Michelle M. Goetz, who was not his wife or a consenting adult of the opposite sex;
2. That there was actual penetration;
3. That the victim was a child under the age of 16 years; and
4. That this act occurred in Sedgwick County, Kansas within 2 years before December 7, 1981.

No. 4

The law places the burden upon the State to prove the defendant is guilty. The law does not require the defendant to prove his innocence. Accordingly, you must presume that the defendant is innocent unless you are convinced, from all the evidence in the case, that he is guilty.

You should evaluate the evidence admitted in this case and determine the innocence or guilt of the defendant entirely in accordance with these instructions. The test you must use is this: if you have no reasonable doubt as to any of the claims made by the State, you should find the defendant guilty as charged; or if you have a reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant not guilty.

No. 5

In order for the defendant to be guilty of the crime charged, the State must prove, beyond a reasonable doubt, that his conduct was intentional. Intentional means willful and purposeful, and not accidental.

Intent, or lack of intent, is to be determined or inferred from all of the evidence in the case.

No. 6

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general in considering the testimony of each witness. You may also take the following factors into consideration when weighing the testimony of a witness:

a) the ability and opportunity of the witness to observe and know the things about which he had testified;

b) the clarity and accuracy of the witness's memory;

c) the witness's manner and conduct while testifying;

d) any interest the witness may have in the result of the trial;

e) the reasonableness of the witness's testimony when considered in light of all the evidence in the case;

f) any bias, interest, prejudice or motive the witness may have.

If you find that any witness has wilfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness; or you may give it such weight as you think it deserves. You should not reject any testimony without cause.

No. 7

You are instructed that you will not concern yourselves in your deliberations with the type of sentence that might be imposed by the court in the event the defendant is found guilty. The type of sentence imposed in any case is exclusively for the court to decide, and the counsel will not be permitted to speculate upon it in their arguments. You should not permit this question to influence your verdict one way or the other.

No. 8

A juror is an officer of the Court, and it is the duty of the jury to work out justice for the parties within the law and evidence.

In your deliberations you should lay aside mere pride of opinion, and should bear in mind that the jury room is no place for advancing theory, or cause, for either side of a case, not arising from the evidence. The aim to be kept in view by the jury is the truth as you find it to be, from the evidence presented, considered with the instructions of the judge.

It is the duty of the jury to consider the evidence and instructions together, and to listen to the arguments of each other with an open mindedness and a disposition to be convinced by them. If, at any time, after such consideration of the evidence and the instructions, a juror is convinced that his or her vote is wrong, it then becomes the duty of such juror to change his or her vote.

No. 9

When you retire to the jury room, you will first select one of your members Foreman, whose duty it is to speak for the jury in court and to see that your discussion

goes forward in a sensible and orderly fashion. Your verdict must be founded entirely upon the evidence admitted and the law as given in these instructions.

I have prepared for you certain verdict forms. When you have arrived at a verdict, you will select the form suited for your findings; your Foreman will sign and date it and return it to the Court. Your verdict must receive the approval of every member of the jury.

You will now listen to the argument of counsel, whose right it is to discuss the case with you.

Statements, arguments and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are evidence, and you must disregard any statements which you believe are not supported by the evidence.

DATE: 3-17-82

/s/ Hal Malone
Hal Malone, Judge

P.I.K. 57.08

57.08 AGGRAVATED SODOMY

The defendant is charged with the crime of aggravated sodomy. The defendant pleads not guilty.

To establish this charge each of the following claims must be proved:

1. That the defendant had (oral) (anal) sexual relations with ....., who was not (his wife) (her husband) (a consenting adult of the opposite sex);

or

That the defendant had (oral) (anal) sexual relations with an animal;

or

That the defendant had sexual relations with an animal;

2. That there was actual penetration;

3. That the defendant (used force or threat of force) (inflicted bodily harm upon the victim during the commission of the act); and

or

That the victim was a child under the age of 16 years;

and

4. That this act occurred on or about the ..... day of ....., 19....., in ..... County, Kansas. Any penetration, however slight, is sufficient. [The lips constitute the entrance to, and are a part of, the mouth.]

Notes on Use

For authority see K.S.A. 21-3506. Aggravated sodomy is a class B felony.

If the crime is oral sex and there is an issue concerning penetration, the bracketed clause should be given.

APPELLANT'S ISSUES ON APPEAL

I. THE TRIAL COURT ERRED BY GIVING INSTRUCTIONS TWO AND THREE (SUBSECTIONS 4), IN THAT:

A. THEY DO NOT FOLLOW P.I.K. AND ARE AT VARIANCE WITH THE "INFORMATION/COMPLAINT" UPON WHICH DEFENDANT WENT TO TRIAL, WHICH COMPLAINT WAS NOT AMENDED TO CONFORM TO EVIDENCE THE INSTRUCTIONS RELATED TO.

B. THE INSTRUCTIONS ALLOWED THE JURY TO CONVICT THE DEFENDANT OF "OTHER CRIMES" WHICH HE WAS NOT CHARGED WITH, NOR PREPARED TO MEET, AND WHICH WOULD NOT ACT AS A BAR TO SUBSEQUENT PROSECUTIONS FOR THE SAME CRIME.

II. THE "COMPLAINT/INFORMATION" FILED IN THE CASE WAS NOT SUFFICIENT TO FAIRLY INFORM THE DEFENDANT OF WHAT HE WAS ACCUSED AND ALLOW HIM TO PREPARE HIS DEFENSE, AND IT DID NOT ACT AS A BAR TO SUBSEQUENT PROSECUTIONS FOR THE SAME OFFENSE (WHEN TAKEN TOGETHER WITH THE INSTRUCTIONS GIVEN IN ERROR BY THE COURT).

III. THE TRIAL COURT ERRED IN NOT ALLOWING DEFENDANT TO CROSS EXAMINE WITNESS JOYCE ALDRICH ON THE ISSUE OF "WELFARE FRAUD" COMMITTED BY HER, SINCE IT GOES TO HER CREDIBILITY AS A WITNESS, AND THE DENIAL HAD THE EFFECT OF DENYING DEFENDANT HIS RIGHTS TO "CONFRONTATION

OF WITNESSES, RIGHT TO COUNSEL, AND DUE PROCESS OF LAW" UNDER THE FIFTH, SIXTH AND DUE PROCESS OF LAW" UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDENTS TO THE UNITED STATES CONSTITUTION.

IV. THE TRIAL COURT ERRED IN NOT ADMITTING DEFENDANT'S EXHIBIT NO. 1 AND ALLOWING DEFENDANT'S ATTORNEY TO CROSS EXAMINE THE VICTIM WITH RESPECT THERETO BECAUSE IT WAS SOUGHT TO BE INTRODUCED TO IMPEACH THE WITNESS AND SHOW HER LACK OF CREDIBILITY; THE DENIAL DENIED DEFENDANT A "FAIR TRIAL" AND HIS RIGHTS TO DUE PROCESS OF LAW, GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

V. THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF DET. McDAVITT IN THAT IT;

A. WAS SELF SERVING HEARSAY BASED ON STATEMENTS OF THE VICTIM MADE AT A TIME WHEN DEFENDANT WAS NOT PRESENT HENCE DENYING DEFENDANT HIS RIGHT OF "CONFRONTATION OF WITNESSES AGAINST HIM", and

B. IT WAS THE ONLY BASIS FOR THE STATES' PROVING "OTHER CRIMES" (NOT SPECIFIED IN THE INFORMATION), AND TURNING THE TRIAL INTO A "TRIAL BY AMBUSH" WHICH "BOOTSTRAPPED" A LOSING CASE INTO A CONVICTION (WITH THE HELP OF THE INSTRUCTIONS GIVEN IN ERROR BY THE COURT).